Statute Law

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Introductory note

For the convenience of readers this section, like its predecessors in the All ER Annual Review series, conforms to the Code set out in the author's textbook *Statutory Interpretation* (see now 2nd edn, 1992 and First Supplement). A reference to the relevant section of the Code is given after each heading in the notes below, where the book itself is referred to as 'Code'. The following cases reported in the first three months of 1992 which are noted in *Statutory Interpretation* (2nd edn) are not included in this section: *R v Secretary of State for Employment, exp Equal Opportunities Commission* [1992] 1 All ER 545 (see Code p 738; Employment Law, pp 128-129 and European Community Law, p 139 above); *Devine v Attorney General for Northern Ireland* [1992] 1 All ER 609 (Code p 439); *R v Redbridge fustices, ex p Ram* [1992] 1 A11ER 652 (Code p 337; Criminal Procedure and Sentencing, p 118 above); *Westminster City Council v Clarke* [1992] 1 All ER 695 (Code p 3 51; Land Law and Trusts, p 225 and Landlord and Tenant, p 248 above); *R v Director of Serious Fraud Office, ex p Smith* [1992] 1 All ER 730 (Code pp 730, 755 and Evidence, pp 146-149 above); *EWPLtdv Moore* [1992] 1 A11ER 880 (Code pp 214, 440, 443, 700; Land Law and Trusts, p 224, Landlord and Tenant, pp 246,247 above); *R v Westminster City Council, exp L* [1992] 1 A11ER 917 (Code p 632).

A case reported early in 1993 is included here rather than being reserved for the 1993 volume because of its great importance. This is *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1992] STC 898 (see pp 381-397 below).

Courts and other adjudicating authorities (Code s 19)

Ouster of jurisdiction (Code pp 64-67)

In *R v Miall* [1992] 3 All ER 153 the Court of Appeal held that the Criminal Justice Act 1988, s 41(3), which states that a magistrates' court's decision to commit a defendant for trial under s 41(1) of that Act 'shall not be subject to appeal or liable to be questioned in any court' did not prevent quashing of a committal order which went beyond the powers conferred by s 41(1). Tudor Evans J said (at 158):

> 'We interpret the language of sub-s (3) as meaning that a lawful decision . . . cannot be subject to appeal or questioned, but that, where the court has reached a decision for which there is no legal basis whatsoever and has

> therefore acted in excess of jurisdiction, then . . . the decision is a nullity and an application lies to quash [it].'

(See the notes on this case at p 371 below, related to Code ss 19(3) and 24 and see further Criminal Procedure and Sentencing, p 116 above.)

The Criminal Justice Act 1988, s 41(3), referred to above, is what *in Rv Cornwall County Council, ex p Huntington* [1992] 3 All ER 566 Mann LJ (at 575) called an *Anisminic* clause (after *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147). He contrasted it with what may be called an *Ostler* clause (after *R v Secretary of State for the Environment, exp Ostler* [1976] 3 All ER 90), which does not preclude the jurisdiction to review a decision in all cases, but only where a review procedure specifically laid down for that type of decision has not been followed. Earlier (at 569) Mann LJ had said of an *Ostler* clause:

> '[It] is a standard type of preclusive clause. There are now many such clauses. The first of them appears to have been s 11 of the Housing Act 1930. The draftsmanship varies, but the common features are the prescription of an opportunity for challenge on specified grounds and of the period within which that challenge can be made together with the proscription of any challenge outside that period.'

Later Mann LJ said (at 575):

> 'The intention of Parliament when it uses an *Anisminic* clause is that questions as to validity are not excluded (see [1969] 1 All ER 208 at 244, [1969] 2 AC 147 at 208 per Lord Wilberforce). When paragraphs such as those considered in *Ex p Ostler* are used, then the legislative intention is that questions as to validity may be raised on the specified grounds in the prescribed time and in the prescribed manner, but that otherwise the jurisdiction of the court is excluded in the interest of certainty.'

The latter principle applies even where, as in *Ostler* itself, the facts on which the allegation of invalidity was based could not have been known within the specified limitation period. That, at least, is what the Court of Appeal decided in *Ostler,* though if the point arose in a future case it might well be held that this was contrary to principle. An extension of time might then be allowed by analogy with the cases on limitation of actions. *(R v Cornwall CC, exp Huntington* is also discussed in Administrative Law, pp 7-9 above.)

Power to adjourn

In *Re C and another (minors)* [1992] 2 All ER 86 (also discussed in Family Law, p 184 above) the Court of Appeal allowed an appeal from an order of a county court judge adjourning an application for a parental rights and duties order under the Family Law Reform Act 1987,**54** for one year on the ground that, although decisions on administrative questions such as whether or not to adjourn a case were essentially a question of case management for the judge, here there had been errors of substance by him. As Mustill LJ put it (at 92):

> 'It was not. . . open to the judge . . . to adjourn the PRO application. He had in essence already decided it, and there was nothing left for him to adjourn. It was, moreover, a procedural error on his part to direct a

postponement of that application without having given an opportunity of being heard on that proposal to [counsel in the case].'

[Note In Code p 67 the above should be substituted for the wording of Example 19.8, which was based on a report of the case in The Independent.]

Remedies (Code p 68)

Where an injunction is granted to restrain breach of a statutory duty, its wording should not go wider than the wording of the enactment: *City of London CorpvBovis Construction Ltd* [1992] 3 AIIER697 (injunction restraining building work amended by insertion of 'without reasonable excuse' to make it conform to wording of the Control of Pollution Act 1974, s 60(8)). (This case is discussed in Practice and Procedure, pp 318-319 above.)

Duty to obey court order (Code s 19(3))

If a court order is made under an enactment, and the order is beyond the power conferred by the enactment, its status depends on whether the court is a superior court or an inferior court. If it is a superior court the rule is as stated by Lord Scarman *in Rp Cain* [1984] 2 All ER 737 at 741, [1985] AC 46 at 55:

> '. . . you cannot describe as a nullity an order made by a superior court of record . . . An order of the Crown Court. . . may be in excess of its statutory power or otherwise irregular. But it is not a nullity. And it would undermine the authority of the criminal law if orders made by the highest court of trial in criminal matters could be disregarded as nullities. The order of the Crown Court stands unless and until set aside [by the Crown Court or an appellate court].'

This was distinguished in *R v Miall* [1992] 3 All ER 153, where the Court of Appeal held that it did not apply to an order made by a magistrates' court purporting to commit a defendant for trial under the Criminal Justice Act 1988, **S4i**(i) in a case to which that section did not apply. The order was a nullity. The court therefore reconstituted itself as a Divisional Court in order to quash it on judicial review. (See also the notes on this case at pp 367-370 above, related to Code s 19(1), and this page, related to Code s 24, and see Criminal Procedure and Sentencing, p 116 above.)

Judicial review (Code s 24)

Nature of jurisdiction (Code p 87)

The Supreme Court sitting in one of its manifestations (say the Court of Appeal) may in the course of hearing a case convert itself temporarily into a Divisional Court for the purpose of disposing of an aspect of the case by judicial review: see *R v Miall* [1992] 3 All ER 153 and cases there cited. (See also the notes on this case at pp 369-370 above, related to Code s 19(1), and this page, related to Code s 19(3), and see Criminal Procedure and Sentencing, p 116 above.)

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Dynamic processing of legislation (Code s 26)

Unjustified production of sub-rules (Code p 98)

Example 26.5 cites Lord Hailsham's dictum *in Rv Lawrence* [1981] 1 All ER 974 at 978, [1982] AC 510 at 520 that 'recklessly' should not be given a refined and detailed meaning by the courts. *In Rv Reid* [1992] 3 All ER 673, where the House of Lords generally affirmed the definition of 'recklessly' given by Lord Diplock in *Lawrence,* they nevertheless supported Lord Hailsham's dictum. Lord Ackner said (at 678):

> 'There are clearly cases of reckless driving in which it is unnecessary to define "recklessly" at all. Many cases turn on simple questions of fact and an analysis of the elements of recklessness would only complicate the issues.'

(See also Criminal Law, pp 100-103 above.)

Overriding effect of an Act (Code s 32)

Influence of common law rule (Code p 114)

In *Owens Bank Ltd v Bracco* [1992] 2 All ER 193 it was argued before the House of Lords that the Administration of justice Act 1920, s 9 (2) *(d)* (by which a judgment obtained in a part of Her Majesty's dominions outside the United Kingdom cannot be enforced in the United Kingdom if it was 'obtained by fraud') must be construed as qualified by the common law rule (based on the principle that there must be finality in litigation) that the unsuccessful party who has been sued to judgment is not permitted to challenge that judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence which was not available to him and could not have been discovered with reasonable diligence before the overseas judgment was delivered. *Held* The argument must be rejected. The common law did not apply the rule to foreign judgments and s 9(2) *(d)* followed the same approach. Lord Bridge said (at 203):

> 'In the decisions in *Aboulqffv Oppenheimer* (1882) 10 QBD 295, [1881-5] All ER Rep 307 and *Vadala v Lawes* (1890) 25 QBD 310, [1886-90] All ER Rep 853 the common law courts declined to accord the same finality to foreign judgments [as was accorded to English judgments], but preferred to give primacy to the principle that fraud unravels everything . . . the judgment creditor seeking registration under the 1920 Act must first surmount the obstacles which s 9(2) places in his way and s *g(2){d),* construed, as I think it must be, as an adoption of the common law approach to foreign judgments, specifically denies finality to the judgment if it can be shown to have been obtained by fraud.'

(See also Conflict of Laws, pp 61-62 above.)

Nature of delegated legislation (Code s 50)

Judicial control (Code p 154)

In *R v Secretary of State for Health, ex p US Tobacco International Inc* [1992] 1 All ER 212 the Divisional Court made an order of certiorari quashing the Oral Snuff (Safety) Regulations 1989 on the ground of procedural impropriety

in that the requirement for prior consultation with the applicants imposed by the Act under which the regulations were made (see the Consumer Protection Act 1987, s 11(5)) had not been complied with. The court rejected — on the ground that the respondent could not fetter a discretion conferred on him in the public interest — the alternative ground put forward by the applicants that they had been deprived of a legitimate expectation (arising from the conduct of the respondent) that the ban imposed by the regulations would not in fact be imposed. *(Note* The justification for this distinction is that the finding that such a fetter existed would prevent such regulations ever being made, whereas quashing the Oral Snuff (Safety) Regulations 1989 would not prevent them being remade after proper consultation, assuming that did not disclose grounds on which it would be improper to remake them.) (See also Consumer Law, p 65 above.)

Duty to exercise delegated powers (Code s 57)

There may be a duty to exercise delegated powers even though they are conferred in discretionary terms. The Immigration Act 1971, s 18(1) says that the Secretary of State 'may by regulations provide' for notice to be given of an appealable immigration decision. In *Pargan Singh v Secretary of State for the Home Department* [1992] 4 All ER 673 the House of Lords held that such regulations *mustbe* made. Lordjauncey said (at 677): 'the Secretary of State does not have a discretion as to whether or not he shall make regulations.'

Presumption against retrospective application (Code s 97)

In *Hager v Osborne* [1992] 2 All ER 494 at 499 Ward J apparently approved the following passages from the comment on Code s 97:

> 'Where, on a weighing of the factors, it seems that *some* retrospective effect was intended, the general presumption against retrospectivity indicates that this should be kept to as narrow a compass as will accord with the legislative intention.' (Code p 215);
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> '. . . an application is not retrospective where . . . the enactment is applied at a time after its commencement to a state of affairs subsisting at that time, even though that state of affairs came into existence before the commencement.' (Code p 216).

(This case is examined in Family Law, p 184 above.)

Application of Act to foreign persons etc: general principles (Code s 128)

Where implied territorial restriction is uncertain

If it is clear that some territorial restriction on the operation of an Act is intended, but it is not possible to discern what its precise nature is, it may have to be left to courts to show suitable restraint in applying the Act to foreign persons or matters. This was laid down by the Court of Appeal in *Re Paramount Airways Ltd* [1992] 3 All ER 1, where the court was unable to arrive at any precise formulation of the limitation implied by Parliament on the width of the term 'any person' in the Insolvency Act 1986,5238 (2). Nicholls V-C said (at 6):

> 'the court is concerned to inquire as to the persons with respect to whom Parliament is presumed to have been legislating when using the expression "any person", and in making that inquiry Parliament is to be taken to have been legislating only for British subjects or foreigners coming to the United Kingdom, unless the contrary is expressed (which it is not here) or is plainly implicit.'

After examining aspects of the enactment he went on (at 10): 'In the end I am unable to discern any satisfactory limitation.'

The court held that the solution did not lie in retreating to a rigid and indefensible line. Trade (and fraud) takes place increasingly on an international basis. To meet these changing conditions English courts, said Nicholls V-C (at n), are increasingly prepared to grant injunctions against non-resident foreigners in respect of overseas activities. Any difficulties can be overcome by two safeguards built into the statutory scheme under the Insolvency Act 1986: the discretion granted to the court and the need for leave before process can be served abroad. (See also Company Law, pp 41-42 above.)

Commonsense construction rule (Code s 197)

Greater includes less (Code pp 409-410)

In *Tower Hamlets London Borough Council v Miah* [1992] 2 All E R 667 the Court of Appeal considered a point under the Housing Act 1985, Sch I, para 6(a). This provides that a tenancy or licence is not secure if the dwelling house has been leased to the landlord for use as temporary housing accommodation. *Held* The term 'leased' must be construed as including a mere licence. Scott LJ said (at 672):

> 'It simply makes no sense to hold that a . . . licence obtained from a local authority holding a licence gives a greater security than a . . . licence obtained from a local authority that holds a tenancy strictly so-called. It is . . . a permissible construction of para 6 of Sch I . . . to hold that the greater includes the less . . .'

(See also Landlord and Tenant, pp 248, 250 above.)

Statutory definitions (Code s 199)

Potency of the term defined

In *Delaney v Staples* [1992] 1 All ER 944 Lord Browne-Wilkinson had regard to the potency of the term defined when (at 947) he said of the definition of 'wages' in the Wages Act 1986, s 7: 'it is important to approach such definition bearing in mind the normal meaning of that word.'

(See also the notes on this case at p 375 below, related to Code s 264, and p 377 below, related to Codes 313 and see further Employment Law, pp 123-125 above.)

Pre-enacting history: the pre-Act law (Code s 210)

An Act may expressly indicate Parliament's view of the pre-Act law, or may indicate that Parliament was uncertain as to this. Thus the Congenital Disabilities (Civil Liability) Act 1976, s 4(5) says that in relation to births after (but not before) its passing the Act 'replaces any law in force before its

passing, whereby a person could be liable in respect of disabilities with which it might be born'. In *de Martell v Merton and Sutton Health Authority* [1992] 3 All ER 820 *(affd* [1992] 3 A11ER 833) Phillips J relied on the provisions of the Act in relation to a person born before its passing, saying (at 826) that 'they assist the plaintiff to the extent that his case accords with legislative policy and the Act at least recognises the possibility that he has a valid claim at common law'. (See also Medical Law, p 310 above.)

Section 217: Use of Hansard

The important decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 requires the entire rewriting of Code s 217 and comment. Because of the length of the new version it is set out separately at the end of this article (see pp 381-397 below).

Section 220: Special restriction on parliamentary materials

The decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 lays down an important exception to the exclusionary rule (see the rewritten version of Code s 217 and comment set out at the end of this article (pp 381-397 below).

Use of enacting history to ascertain Parliament's view of pre-Act law (Code s 226)

In *Billsonv Residential Apartments Ltd* [1992] 1 All ER 141 the House of Lords reversed the decision of the Court of Appeal reported at [1991] 3 All ER 265 and referred to at Code p 470. The grounds of the reversal did not, however, affect the point on which the case is cited at Code p 470. (See also Landlord and Tenant, pp 232, 234-236 above.)

Law should serve the public interest (Code s 264)

Construction in bonam partem (Code pp 546-548)

As to the principle that fraud unravels everything see the note on *Owens Bank Ltd v Bracco* [1992] 2 All ER 193 at p 372 above, related to Code s 32.

Interest reipublicae ut sit finis litium (Code p 543)

In *Delaney v Staples* [1992] 1 All ER 944 Lord Browne-Wilkinson said (at 952) that for an employee to be forced to bring two sets of proceedings for small sums of money in respect of one dismissal was wasteful of time and money, and brought the law into disrepute. He complained that for nearly 20 years the courts had unavailingly urged the minister to resolve the problem by conferring jurisdiction to deal with breaches of contract on industrial tribunals by an order under the Employment Protection (Consolidation) Act 1978, s 131.

See also the notes on this case at p 374 above, related to Code s 199, and p 377 below, related to Code s 313 and see further Employment Law, pp 123-125 above. As to the principle that there must be finality in litigation see the

note on *Owens Bank Ltd v Bracco* [1992] 2 All ER 193 at p 372 above, related to Code s 32.

Municipal law should conform to public international law (Code s 270)

European Convention on Human Rights

In *R v Secretary of State for the Home Department, exp Wynne* [1992] 2 All ER 301 (affd *Wynne v Secretary of State for the Home Department* [1993] 1 All ER 574) Staughton LJ said of the European Convention on Human Rights (at 315): 'This is, of course, not part of our law; but it is important to pay attention to it.'

Statutory interference with economic interests (Code s 278)

The power formerly conferred on a local authority by the Housing Act 1957, s 10(3) (see now the Housing Act 1985, s 193 and Sch 10) to recover from the owner, etc, of a house expenses incurred by the authority in repairing the house is subject to the Limitation Act 1980, s 9(1). This provides that an action brought to recover any sum recoverable by virtue of an enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

In *Swansea City Council v Glass* [1992] 2 All ER 680 the Court of Appeal applied what Taylor LJ (at 684) called the classic definition of a cause of action given by Lord Esher MR in *Read v Brown* (1888) 22 QBD 128: 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court'. They held that a merely procedural requirement, such as that requiring the giving of written notice of the demand, was not part of the cause of action in county court proceedings. They were fortified in this view by the fact that the Housing Act 1957, s 10(4) expressly stated that as respects proceedings for recovery in a magistrates' court time ran from service of the demand or when it became operative. Taylor LJ said (at 686) that this was intended to distinguish summary proceedings from other proceedings, adding: 'Inclusio unius, exclusio alterius'. (For the latter principle see Code ss 390-395.)

Statutory interference with rights of legal process (Code s 281)

Due process

Speaking of Magna Carta clause 40 (to no one will we sell, deny or delay right or justice), set out at Code p 578, Staughton LJ said that such formulations were statements of broad general principle, 'such as one now finds not in English but in European legislation' and were 'not intended to apply literally and in every case where other considerations were involved': *R v Secretary of State for the Home Department, exp Wynne* [1992] 2 All ER 301 at 315 (affd *Wynne v Secretary of State for the Home Department* [1993] 1 All ER 574). (This is a reference to the weighing and balancing of interpretative factors discussed in Code Part X.) *In Attorney General's Reference (No 1 of 1990)* [1992] 3 All ER 169 (see also Criminal Procedure and Sentencing, p 376 above) the

Court of Appeal held that 'delay' in clause 40 'means, at its lowest, wrongful delay or deferment, such as is not justified by the circumstances of the case' (per Lord Lane CJ at 174).

Presumption that rectifying construction to be given (Code s 287)

Meaning narrower than the object (casus omissus) (Code pp 614-615)

Sometimes a casus omissus is too considerable to be remedied by a rectifying construction. The court may then call for intervention by Parliament. In *Duo v Duo* [1992] 3 All ER 121 Lord Donaldson MR said (at 130):

> 'It is undoubtedly - and I have mentioned this once before - a very serious defect in the law that the Domestic Violence and Matrimonial Proceedings Act 1976 applies only so long as the parties are married or, alternatively, if they are not married but are living together as a couple, so long as they are living together. Very often the need for a non-molestation order buttressed by a power of arrest is greater when the parties have recently split up or the marriage has recently ended . . .'

(This case is also discussed in Contempt of Court, pp 84-85 above.)

Avoiding an unworkable or impracticable result (Code s 313)

In *Delaney v Staples* [1992] 1 All ER 944 the House of Lords applied the presumption against unworkability in rejecting a proffered construction of the Wages Act 1986. Lord Browne-Wilkinson said (at 950-951): 'I find that provisions of the Act cannot be made to work if payments in lieu are included in the meaning of wages.'

(See also the notes on this case at p 374 above, related to Code s 199, and p 375 above, related to Code s 264, and see further Employment Law, pp 123-125 above.)

Evasion distinguished from avoidance (Code s 320)

Ramsay principle

The principle regarding tax avoidance which is chiefly exemplified in *WT Ramsay Ltd v IRC* [1981] 1 All ER 865, [1982] AC 300 requires a series of connected transactions to be looked at as a whole, with emphasis being given to the end result. What may be described as self-cancelling transactions are therefore to be disregarded. In *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 2 All ER 275 the House of Lords held that where a series of transactions were engaged in by a company in relation to a commercial film solely in order to take advantage of the first-year capital allowances available under the Finance Act 1971, s 41(1) the apparent expenditure ranking for allowance of $14m was to be treated as cut down to $3.25m, being the amount actually expended by them when self-cancelling transactions were excluded. Lord Templeman referred (at 290-291) to the *Ramsay* concept of 'magical' tax losses which, when the transactions were balanced out, were found not actually to have arisen. In the present case $10.75m of the alleged expenditure was 'magical' while the remaining 13.25m was real and ranked for the allowance. Lord Templeman said (at 291):

> 'There is nothing magical about tax mitigation whereby a taxpayer suffers a loss or incurs expenditure in fact as well as in appearance .. . The principles of *Ramsay* and subsequent cases do not require the courts to disregard all the fiscal consequences of a single composite transaction read as a whole on the grounds that it appears that the transaction was a tax avoidance scheme.'

(See also Taxation, pp 404-406, 408, 410 below.)

Presumed application of constitutional law rules (Code s 328)

Taxation only by Parliament

The principle enshrined in the Bill of Rights that taxes should not be levied without the authority of Parliament means that the repayment of taxes exacted by the taxing authorities under an unlawful demand can be enforced as a matter of right: *Woolwich Building Society v Inland Revenue Commissioners* (No 2) [1992] 3 All ER 737 (see Code Example 84.2). Lord Goff said (at 764) that it is probable that this principle applies not only to ultra vires demands but also 'to cases in which the tax has been wrongly exacted not because the demand was ultra vires but for other reasons, for example because the taxing authority has misconstrued a relevant statute or regulation'. (However such misconstruction may obviously be the reason why an ultra vires demand is made.) (This case is also discussed in Land Law and Trusts, pp 209-210 and The Law of Restitution, pp 255, 266, 272 above.)

Presumed application of rules of equity (Code s 330)

In *Billson v Residential Apartments Ltd* [1992] 1 All ER 141 the House of Lords reversed the decision of the Court of Appeal reported at [1991] 3 All ER 265 and referred to at Code p 746 (Example 330.6). The grounds of the reversal did not however affect the point on which the case is cited at Code p 746.

Implied application of rules of evidence (Code s 335)

Standard of proof (Code pp 762-763)

Where in non-criminal proceedings, such as a hearing before a professional disciplinary tribunal, what is alleged is tantamount to a criminal offence the criminal standard of proof should be taken as intended to be applied: *Re a Solicitor* [1992] 2 All ER 335 at 344. (See also Evidence, p 171 and Solicitors, pp 357-358 above.)

Public interest immunity (Code pp 765-766)

The question whether the doctrine of public interest immunity also applies in criminal cases was discussed in *R v Governor of Brixton Prison, exp Osman (No 1)* [1992] 1 A11ER 108, where the Divisional Court held that it does (see also Evidence, p 169 and Extradition, pp 176-177 above). Mann LJ said (at 116):

> 'The seminal cases in regard to public interest immunity do not refer to criminal proceedings, but the principles are expressed in general terms. Asking myself why those general expositions should not apply to criminal proceedings, I can see no answer but that they do ... I acknowledge that [their

application] will involve a different balancing exercise to that in civil proceedings.'

This was followed in *R v Clowes* [1992] 3 All ER 440 (discussed in Evidence, p 169 above).

De minimis principle (Code s 343)

In *Hambleton District Council v Buxted Poultry Ltd* [1992] 2 All ER 70 the Court of Appeal, applying the definition of 'agricultural buildings' in the General Rate Act 1967, s 26(4), held that a provender mill was not 'solely' used in connection with agricultural operations carried out on certain land when 6% to 8% of its output was delivered to other farms. Glidewell LJ said (at 80):

> 'I do not see how 6% to 8% of the production can be disregarded as de minimis. Apart from my general view, I am supported by the fact that clearly Buxted do not and did not regard it as de minimis, because they would not have continued to supply the four other farms with about 200 tons per week of pellets if they had.'

Judge in own cause (Code s 348)

Judicial independence

Whenever an enactment provides for the appointment of any judicial officer it will be taken to imply that the independence of the officer is to be preserved. The Children Act 1989, s 41 requires the court to appoint a guardian ad litem in certain cases, 'who shall be under a duty to safeguard the interests of the child'. Though appointed by and answerable to the court, guardians ad litem are remunerated by the local authority. In *R v Cornwall County Council, exp Cornwall and Isles of Stilly Guardians ad Litem and Reporting Officers Panel* [1992] 2 All ER 471 the local authority, in order to keep down the costs of the service, sought to restrict the time spent by guardians ad litem on their cases. Holding this to be an abuse of power, Sir Stephen Brown P said (at 479) that it was vital that the independence of the guardian ad litem in carrying out his or her duties should be 'clearly recognised and understood'. In words which are applicable to any judicial officer appointed under statute, he added:

> '. . . it is vitally important that the position of the guardian should not be compromised by any restriction placed directly or indirectly upon him or her in the carrying out of his or her duties. It is important that the courts and the public should have confidence in the independence of the guardians. It is also important that the guardians themselves should feel confident of their independent status.'

(This case is discussed in Administrative Law, pp 6-7 and Family Law, pp 186-187 above.)

Benefit from own wrong (Code s 349)

As to the principle that no one should be allowed to profit from his own wrong see the note on *Owens Bank Ltd v Bracco* [1992] 2 All ER 193 at p 372 above, related to Code s 32.

Interpretation of broad terms (Code s 356)

Judicial guidelines

The mere fact that a statutory discretion is unfettered does not prevent the court from laying down guidelines as to its exercise: *Ramsden v Lee* [1992] 2 All ER 204 at 211 (concerning the discretion conferred by the Limitation Act 1980 s 33 and discussed in Tort, pp 447-448 below). A court should not, however, lay down guidelines where the need for them has not been made 'entirely apparent', since the risk is then that cases will be treated as matters of law on the interpretation not of the enactment but the guidelines: *Ramsden v Lee* [1992] 2 All ER 204 at 209. In matters of practice and discretion, if judicial guidelines are needed, they are better laid down by the Court of Appeal than the House of Lords: *Thompson v Brown Construction (Ebbw Vale) Ltd* [1981] 2 All ER 296 at 303, [1981] 1 W L R 744 at 752.

Ordinary meaning of words and phrases (Code s 363)

Several ordinary meanings

Where a word has both a wider and a narrower ordinary meaning the court will select the meaning which most nearly corresponds to the mischief, so avoiding a *casus omissus* or *casus male inclusus* (for these see Code pp 614-616). In *R v Callender* [1992] 3 All ER 51 the question arose whether a self-employed accountant who had obtained work by a dishonest deception fell within the Theft Act 1968, s 16(2) as having been 'given the opportunity to earn remuneration ... in an office or employment'. *Held* The wider meaning of 'employment' would be applied since otherwise there would be a gap in the legislation. (See also Criminal Law, pp 103-104 above.)

Tense (Code pp 829-830)

In *Billson v Residential Apartments Ltd* [1992]! All ER 141 the House of Lords reversed the decision of the Court of Appeal reported at [1991] 3 AH ER 265 (see All ER Rev 1991, pp 218-219, 324, 330 and 334). Although the Law of Property Act 1925, s 146(2) allows relief against forfeiture of a lease only where 'a lessor *is* proceeding, by action or otherwise, to enforce' a right of re-entry (emphasis added), the House of Lords held that where the lessor had re-entered without bringing an action relief was available even after the entry was complete. The reason given was that as long as the lessor can justify keeping the tenant out only by pleading the re-entry it can be said that he *is* proceeding to enforce the right of re-entry. Although this is clearly a strained construction, Lord Templeman (at 146) maintained that it did no violence to the language and that the phrase 'is proceeding' was ambiguous.

Cessation of existence

Where a person or thing of a category referred to in an enactment has died or otherwise ceased to exist at the time the enactment falls to be applied, the enactment will normally not apply. What has ceased to exist cannot properly be said to fall within the category. However, the wording of the enactment

may indicate a contrary intention. *InRv Maguire* [1992] 2 All ER 433 the Court of Appeal held (at 436) that the words 'Where a person has been convicted' in the Criminal Appeal Act 1968 s 17(1) 'are wide enough to embrace apersonwho is dead'. (See also Example 395.2 at Code p 879. This case is discussed in Criminal Procedure and Sentencing, p 114 and Evidence, p 381 above.)

***Expressio unius* principle: words providing remedies, etc** (Code s 392)

For an example see the note on *Swansea City Council v Glass* [1992] 2 All ER 680 at p 376 above, related to Code s 278.

Pepper v Hart

The following is the revised version of Code s 217 (Use of Hansard).

> '(1) This section applies to an enactment contained in an Act where, in the opinion of the court construing the enactment, it is ambiguous or obscure, or its literal meaning leads to an absurdity.
>
> (2) In arriving at the legal meaning of the enactment, the court may have regard to any statement, as set out in the Official Report of Debates ('Hansard') on the Bill for the Act, which satisfies the requirements of subsections (3) to (5) below, together with such other parliamentary material (if any) as is relevant for understanding that statement and its effect. In allowing an advocate to cite such material the court must ensure that he or she does not in any way impugn or criticise the statement or the reasoning of the person making it.
>
> (3) The statement must be made by or on behalf of the Minister or other person who is the promoter of the Bill.
>
> (4) The statement must disclose the mischief aimed at by the enactment, or the legislative intention underlying its words.
>
> (5) The statement must be clear.
>
> (6) In applying the rule set out above in this section ('the rule in *Pepper v Hart')* the court may overrule an earlier decision which is not binding on it and was arrived at before the rule was introduced.'

COMMENT

This section codifies the rule laid down by the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, where the leading speech, concurred in by all the other six Law Lords on a specially-enlarged Appellate Committee except Lord Mackay of Clashfem LC, was delivered by Lord Browne-Wilkinson (at 53-74). The decision was presented as the relaxation of a previously existing exclusionary rule under the 1966 practice statement (at 55). (For the practice statement see *Note (Judgment: Judicial Decision as Authority: House ofLords)* [1966] 3 All ER 77, sub nom *Practice Statement (Judicial Precedent)* [1966] 1 W L R 1234.) However, that rule was not set out in any of the speeches, no doubt because of the difficulty of formulating it. Accordingly, it has been thought most helpful to present *Pepper v Hart* here as laying down a permissive rule of its own rather than an exception.

4

The new permissive rule needs to be applied with caution if it is not to subvert important constitutional principles concerning the nature of legislation and its relation to the intention of Parliament (see Code Part VIII, especially ss 166 and 167). It is not the court's function necessarily to give effect to a statement by the sponsor of a Bill, however 'clear' it may be. For one thing, this would rule out an updating construction where this was later required (see Code s 288). It has been said by two recent commentators that:

> '... the imagined benefits of permitted limited recourse to *Hansard* contain serious constitutional and practical difficulties ... In our view the reasoning of the House in *Pepper v Hart* is seriously undermined by the reality of what the courts are actually engaged in when reviewing executive action. The notion that judges inevitably follow what Parliament intended erodes any constitutional safeguards against manifestly unfair legislation and is not what happens.'

(see Richard Gordon and Chris Ward 'Counting the Cost of Hansard' Local Authority Law 27 Jan 1993, p 7).

According to the speeches in *Pepper v Hart,* Hansard can be relied on only where it is objectively true (or in practical terms where the court *holds* it to be objectively true) (a) that the enactment falls within the description set out in sub-s (1), and (b) that the sponsor's statement satisfies sub-s (3) to (5). Lord Browne-Wilkinson said (at 67): 'Attempts to introduce material which does not satisfy those tests should be met by orders for costs made against those who have improperly introduced the material.' In what follows, the tests are referred to as the *Pepper v Hart* conditions.

It seems that, for the reason set out in Code s 201(2), advocates must be allowed to cite Hansard whenever they *argue* that the *Pepper v Hart* conditions are satisfied, even though in the end the court rules against that contention (for the right of a litigant or advocate to present argument to the court in such manner as he or she thinks fit, within obvious limits of propriety, see Code p 592). Only when the court has heard all the argument, and consulted the material referred to in that argument, can it properly decide whether or not the tests are satisfied (a typical judicial finding in such cases is that of Lord Blanesburgh in *Assam Railways and Trading Co Ltd v IRC* [1935] AC 445 at 450, [1934] All ER Rep 646 at 651: 'It is only after close examination that the ambiguities of s 27, sub-s 1 of the Finance Act 1920 become apparent'). This does not permit citation of material which *obviously* fails the tests, but considerable margin needs to be allowed for legitimate differences of opinion (as to the problem of differential readings see Code p 389). Following the decision in *Pepper v Hart,* amendments were made on 1 February 1993 to the practice directions governing civil and criminal appeals to the House of Lords. These added the following: 'Supporting documents, including extracts from *Hansard,* will only be accepted in exceptional circumstances': *Practice Direction (petition: supporting documents)* [1993] 1 All ER 573. If those lodging the petition object to a ruling by the Judicial Office that an extract is inadmissible the matter is referred for informal decision to two or more Law Lords. *(Note* The author is informed by the Judicial Office that the wording given in [1993] 1 All ER 573 is incorrect in that the words 'including extracts from *Hansard*' were omitted in the final version.)

Subsection (1) The rule is stated to apply only in two categories of case, namely where, on the point at issue, (1) the enactment is ambiguous or obscure, or (2) its literal meaning leads to an absurdity. (For the meaning of these terms see Code ss 153 ('ambiguity'), 155 ('obscurity'), 156 ('literal meaning') and 312 ('absurdity').) This reduces the possibility of the court being confronted by a ministerial statement contradicting the plain literal meaning of the enactment. In such a case, unless 'absurdity' were pleaded, recourse to Hansard would be inadmissible. The apparent width of this limitation is however reduced by the fact that opinions often differ widely as to whether a meaning really is 'plain' (see Code s 3).

Courts very often hold an enactment to be ambiguous or obscure when in reality what it is doing is conferring on the court a wide discretion, or an opportunity to use its judgment across a wide spectrum (as to the distinction between discretion and judgment see Code s 20). As will appear, this happened in *Pepper v Hart* itself, where all the judges involved appeared to overlook the significance of the term 'proper' in relation to powers of apportionment.

Counsel for the taxpayers in *Pepper v Hart* suggested a third heading justifying recourse to parliamentary history, which the House rejected. This was 'to confirm the meaning of a provision as conveyed by the text, its object and purpose' (at 47). (In *Warwickshire County Council v Johnson* [1993] 1 All ER 299 the House of Lords used Hansard for this purpose. Lord Roskill (who delivered the only full speech) said after reciting passages from Hansard: 'In my view the answers given by the Minister are consistent with the construction I have felt obliged to put upon this legislation' (at 305).) On the effect of the new rule Lord Mackay said (at 47, his italics):

> 'I believe that practically every question of *statutory* construction that comes before the courts will involve an argument that the case falls under one or more of these three heads. It follows that the parties' legal advisers will require to study Hansard in practically every such case to see whether or not there is any help to be gained from it.'

Later in his speech the Lord Chancellor said (at 48):

> 'If reference to parliamentary material is permitted as an aid to the construction of legislation which is ambiguous, or obscure or the literal meaning of which leads to an absurdity, I believe as I have said that in practically every case it will be incumbent on those preparing the argument to examine the whole proceedings on the Bill in question in both Houses of Parliament. Questions of construction may be involved on what is said in Parliament and I cannot see how if the [exclusionary] rule is modified in this way the parties' legal advisers could properly come to court without having looked to see whether there was anything in the Hansard report on the Bill which could assist their case. If they found a passage which they thought had a bearing on the issue ... that passage would have to be construed in the light of the [parliamentary] proceedings as a whole.'

Certainly it is difficult to conceive of many genuine points of construction upon which a statement in Hansard is relevant and where it cannot be said that the enactment is ambiguous or obscure or that a meaning contended for leads to 'absurdity', given the very wide meaning attached to that term ('... the courts give a very wide meaning to the concept of "absurdity", using

it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief': Code s 312(1)). Indeed it seems that in relation to *Pepper v Hart* it may be necessary to extend the meaning of 'absurdity' even further. A construction which would, for example, cause injustice, or harm the national interest, or endanger life, has not hitherto been brought under the heading of 'absurdity' (for cases of this type see Code Parts XXIII and XXIV). Yet surely the new rule must apply to such cases, if it is really based upon principle as Lord Browne-Wilkinson says (at 64).

Other Law Lords in *Pepper v Hart* took a less strict view as to the practical consequences of the new rule. Who then is right about the duty of legal advisers to search Hansard? How far does the duty really go under the new rule? In view of the importance of this point it is necessary to set out the relevant dicta in full.

Lord Bridge of Harwich said (at 49):

> '... I find it difficult to suppose that the additional cost of litigation [through the need to search Hansard] or any other ground of objection can justify the court continuing to wear blinkers which, in such a case as this, conceal the vital clue to the intended meaning of an enactment. I recognise that practitioners will in some cases incur fruitless costs in the search for such a vital clue where none exists. But, on the other hand, where Hansard does provide the answer, it should be so clear to both parties that they will avoid the cost of litigation.'

Lord Griffiths said (at 50):

> 'I cannot agree with the view that consulting Hansard will add so greatly to the cost of litigation that on this ground alone we should refuse to do so. Modern technology greatly facilitates the recall and display of material held centrally. I have to confess that on many occasions I have had recourse to Hansard, of course only to check if my interpretation has conflicted with an express parliamentary intention, but I can say that it does not take long to recall and assemble the relevant passages in which the particular section was dealt with in Parliament, nor does it take long to see if anything relevant was said. Furthermore if the search resolves the ambiguity it will in future save all the expense that would otherwise be incurred in fighting the rival interpretations through the courts. We have heard no suggestion that recourse to parliamentary history has significantly increased the cost of litigation in Australia or New Zealand and I do not believe that it will do so in this country.

Lord Oliver of Aylmerton said (at 52):

> 'Ingenuity can sometimes suggest an ambiguity or obscurity where none exists in fact, and if the instant case were to be thought to justify the exercise of combing through reports of parliamentary proceedings in the hope of unearthing seme perhaps incautious expression of opinion in support of an improbable secondary meaning, the relaxation of the rule might indeed lead to the fruitless expense and labour which has been prayed in aid in the past as one of the reasons justifying its maintenance. But so long as [the *Pepper v Hart* conditions] are understood and observed, I do not, for my part, consider that the relaxation of [the exclusionary rule] will lead to any significant increase in the cost of litigation or in the burden of research required to be undertaken by legal advisers.'

Lord Browne-Wilkinson said (at 63-64):

> 'Although the practical reasons for the [exclusionary] rule (difficulty in getting access to parliamentary materials and the cost and delay in researching it) [sic] are not without substance, they can be greatly exaggerated: experience in Commonwealth countries which have abandoned the rule does not suggest that the drawbacks are substantial, provided that the court keeps a tight control on the circumstances in which references to parliamentary material are allowed ... [In reference to this argument Lord Mackay LC pointed out (at 48) that 'Parliamentary processes in these jurisdictions are different in quite material respects from those in the United Kingdom'.] On the other side, the Attorney General submitted that [the exclusionary rule] had a sound constitutional and practical basis ... in order to establish the significance to be attached to any particular statement [in Parliament], it is necessary both to consider and to understand the context in which it was made .. . there are all the practical difficulties as to the accessibility of parliamentary material, the cost of researching it and the use of court time in analysing it ... '

In a further passage on this point Lord Browne-Wilkinson said (at 66-67):

> 'It is said that parliamentary materials are not readily available to, and understandable by, the citizen and his lawyers, who should be entided to rely on the words of Parliament alone to discover his position. It is undoubtedly true that Hansard and particularly records of committee debates are not widely held by libraries outside London and that lack of satisfactory indexing of committee stages makes it difficult to trace the passage of a clause after it is redrafted or renumbered. But such practical difficulties can easily be overstated. It is possible to obtain parliamentary materials and it is possible to trace the history. The problem is one of expense and effort in doing so, not the availability of the material. . . Next, it is said that lawyers and judges are not familiar with parliamentary procedures and will therefore have difficulty in giving proper weight to the parliamentary materials. Although, of course, lawyers do not have the same experience of these matters as members of the legislature, they are not wholly ignorant of them . . . Then it is said that court time will be taken up by considering a mass of parliamentary material and long arguments about its significance, thereby increasing the expense of litigation . . . There is one further practical objection which, in my view, has real substance. If the rule is relaxed legal advisers faced with an ambiguous statutory provision may feel that they have to research the materials to see whether they yield the crock of gold, ie a clear indication of Parliament's intentions. In very many cases the crock of gold will not be discovered and the expenditure on the research [will be] wasted ... However, again it is easy to overestimate the cost of such research: if a reading of Hansard shows that there is nothing of significance said by the minister in relation to the clause in question, further research will become pointless.'

In considering these dicta, comments made in 1948 by Robert H Jackson, a Justice of the US Supreme Court, about the long-standing American practice of allowing recourse to legislative history may be found pertinent:

> 'There is a tendency to decrease the measure of the ambiguity which originally justified recourse to legislative history. But even if the ambiguity is genuine and substantial, do we find more solid ground by going back of it? It is a poor cause that cannot find some plausible support in legislative history, which often includes tentative rather than final views of legislators or leaves misinterpretation unanswered lest more definite statements imperil the

> chance of passage. The custom of remaking statutes to fit their histories has gone so far that a formal act, read three times and voted on by Congress and approved by the President, is no longer a safe basis on which a lawyer may advise his client, or a lower Court decide a case. This has very practical consequences to the profession. The lawyer must consult all of the committee reports on the bill, and on all its antecedents, and all that its supporters and opponents said in debate, and then predict what part of the conflicting views will likely appeal to a majority of the Court. Only the lawyers of the capital or the most prosperous offices in the large cities can have all the necessary legislative material available.'

(See 'The Meaning of Statutes: What Congress Says or What the Court Says' 34 Am BAJ (1948) 535 at 538.)

Earlier (at 537-538) Justice Jackson said of recourse to legislative history, 'I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession'. He remarked that 'British Courts, with their long accumulation of experience, consider Parliamentary proceedings too treacherous a ground for interpretation of statutes'.

In the light of the dicta in *Pepper v Hart* cited above the following rules can be extracted as to the professional duty of legal advisers and advocates as a consequence of the decision.

1. In practically every case involving the construction of an enactment, there must be a search in Hansard. This is because it is rarely possible to be sure, without full knowledge of the background, that the *Pepper v Hart* conditions are not satisfied.
2. The duty extends to the construction of delegated legislation and not only where it is debated in Parliament. The sponsor may have made a statement in debates on the Bill for the parent Act which indicates the way the delegated power was intended to be exercised.
3. The duty may extend to Hansard reports on other related Bills, as happened in *Pepper v Hart* itself (see at 56-57).
4. A relevant passage in Hansard must be studied in the light of the parliamentary proceedings as a whole. In particular care must be taken to ensure that a statement by the sponsor was not affected by subsequent developments, eg a later amendment to the Bill.
5. Practitioners need to know how to find and search parliamentary materials competently.
6. Practitioners need to understand parliamentary legislative procedure in order to evaluate the significance of passages found and present them to the court.

Subsection (2) The speeches in *Pepper v Hart* do not go into any detail about the nature of the parliamentary materials to which the new rule applies. Lord Browne-Wilkinson spoke of 'the Parliamentary history of the legislation or Hansard' (at 53). Elsewhere he referred to 'Parliamentary materials [consisting of] one or more statements by a minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect' (at 69). The other Law Lords merely mention 'Hansard'. A letter from the Clerk of the House of

Commons cited by Lord Browne-Wilkinson alludes to 'the Official Report of Debates' (at 55). A relevant resolution of the House of Commons adds 'the published Reports and evidence of Committees' (at 55). Since, however, *Pepper v Hart* is intended as a relaxation of the exclusionary rule it seems that it should be treated as relating to the same materials as that rule does.

The final sentence of sub-s (2) derives from a dictum of Lord Browne-Wilkinson in *Pepper v Hart* (at 69).

Subsection (3) The decision in *Pepper v Hart* relates only to a statement made by or on behalf of the promoter of the Bill. In the case of a government Bill this will be the minister in charge of the Bill. As respects a private Member's Bill it will be the MP or peer who introduced the Bill into the House in question. A statement may be made 'on behalf of' the sponsor where it is made by a junior minister or a law officer. However, in the case of private Members' Bills, government spokespersons often make authoritative comments which cannot be said to be made on behalf of the sponsor. They are made on behalf of the government. On principle it seems that such statements should be treated as within the new rule.

Lord Browne-Wilkinson justified the limitation by saying 'as at present advised I cannot foresee that any statement other than the statement of the minister or other promoter of the Bill is likely to meet these criteria' (ie that it clearly discloses the mischief aimed at or the legislative intention lying behind the words of the enactment) (at 64). A Bill is introduced to rectify a mischief, and obviously it is those responsible for drafting and introducing the Bill who best know what mischief it is intended to deal with and the nature of the intended remedy. However, it may prove difficult in practice to limit recourse to parliamentary materials in this way. A similar attempt was made in the United States, with results expressed by a critic as follows:

> 'The courts used to be fastidious as to where they looked for the legislative intention. They used to confine the enquiry to reports by committees [of the legislature] and statements by the member in charge of the Bill. But now the pressure of the orthodox doctrine has sent them fumbling about in the ashcans of the legislative process for the shoddiest unenacted expressions of intention.'

(Charles P Curtis, 'a Better Theory of Legal Interpretation' (1949) 4 *The Record of the Association of the Bar of the City of New York* 321 at 327-328.)

By 'the orthodox doctrine' Curtis meant the doctrine that the legislator's original intention is what counts. His 'better theory' would substitute a creative approach akin to updating construction (for this see Code s 288).

Subsection (4) Lord Browne-Wilkinson said that the new rule should apply only where the sponsor's statement 'discloses the mischief aimed at [by the enactment] or the legislative intention lying behind the ambiguous or obscure words' (at 64). For the meaning of these terms see Code ss 290 ('mischief') and 163 (legislative intention).

Subsection (5) That the sponsor's statement must be 'clear' was stressed by several of the Law Lords in *Pepper v Hart*. Lord Bridge said the new rule should apply 'only in the rare cases where the very issue of interpretation

which the courts are called on to resolve has been addressed in Parliamentary debate and where the promoter of the legislation has made a clear statement directed to that very issue' (at 49). Lord Oliver confined the rule to the case 'where the difficulty can be resolved by a clear statement directed to the matter in issue' (at 52). Lord Browne-Wilkinson limited it to the case where 'the statements relied upon are clear' (at 69). He went so far as to add (at 68): 'The purpose of looking at Hansard will not be to construe the words used by the minister but to give effect to the words used so long as they are clear.' This places an unusually narrow meaning on the verb 'construe', defined by the *Oxford English Dictionary* as 'To give the sense or meaning of; to expound, explain, interpret (language)' (2nd edn, 1989), meaning 4a; see also Code s 1. Like the insistence that the enactment must be ambiguous or obscure etc, it seems to overlook the fact, noted above in this comment, that different minds often see a statement as having different meanings or differ on whether its meaning is 'plain'.

Enactments in Pepper v Hart We now examine the facts and conclusions in *Pepper v Hart* itself. It is submitted, for reasons that will appear, that the majority of the Appellate Committee failed to apply the carefully-considered, though intricate, wording of the relevant provisions and that if they had done so there would have been no need to refer to Hansard in order to arrive at the correct conclusion.

The case concerned rival interpretations of income tax enactments contained in the Finance Act 1976 ss 61(1) and 63(1) and (2) (see now the Income and Corporation Taxes Act 1988, ss 154(1) and 156(1) and (2)). A selective comminution of these (for the technique of selective comminution, which stricdy adheres to the original wording of the enactment so far as relevant, see Code s 139) reads:

> '(1) Where in any year a person is employed in higher-paid employment *and*
> (2) by reason of his employment there is provided for him, or for others being members of his family, any benefit to which the Finance Act 1976 s 61 applies *and*
> (3) the cost of providing the benefit is not (apart from that section) chargeable to tax as his income
> (4) there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, an amount equal to whatever is the *cash equivalent* of the benefit.
> (5) The cash equivalent of the benefit is an amount equal to the *cost of the benefit,* less so much (if any) of it as is made good by the employee to those providing the benefit.
> (6) The cost of a benefit is the amount of any expense incurred in or in connection with its provision, and includes a *proper* proportion of any expenses relating partly to the benefit and partly to other matters.' (Emphasis added.)

It will be noted that clauses (4) to (6) lay down a precise three-stage definition, intended to be precisely applied stage by stage. Tax is levied on the *cash equivalent.* This is defined as the *cost* less anything paid by the employee. The cost is defined as the *expense* incurred, including a proper proportion of multi-purpose expenses.

The taxpayers were nine masters and the bursar of Malvern College, a public school for boys. Under a concessionary scheme their twelve sons were educated at the school on payment of an amount, namely one-fifth of the ordinary fees, which in each case more than covered the extra actual cost to the school of the son's presence ('the extra cost'). As the school was not full, the son's presence did not deprive it of any fees from ordinary pupils whose places they would have been occupying. There was no dispute that the conditions in clauses (1) to (3) of the above restatement applied. Nor was there any dispute as to the meaning of clauses (4) and (5). The only point at issue concerned the meaning of clause (6). By a further selective comminution the disputed statutory words can be presented as: *a proper proportion of the expenses incurred in or in connection with the provision of the benefit.*

Here 'the expenses' means the expenses incurred by the school and 'the benefit' means the share in the school amenities enjoyed by each of the sons. Since the school amenities (which included use of land and buildings, tuition and meals, and in some cases lodging) were also enjoyed by the ordinary pupils paying full fees it follows that 'the expenses' of each son's 'benefit' should be treated as relating partly to that benefit and partly to 'other matters', ie the enjoyment of the school amenities by all the other pupils. So the weight of interpretation comes down on the phrase 'a proper proportion'. It also comes down on the word 'expenses', because theoretically this could mean either gross expenses, without regard to gross income receipts from pupils' fees, or net expenses after deduction of such fees. We consider the latter point first.

Gross or net expenses? It would seem that clause (6) must be referring to gross expenses since otherwise there would in most cases be nothing to tax. Employers normally ensure that their products are so priced as to attract an overall profit, whether or not they are also furnished as in-house benefits to staff. However, in *Pepper v Hart* Lord Oliver said (at 52-53):

> 'Where . . . the cost of providing a service is balanced or overtopped by amounts received for the service from others to whom it is provided, the man in the street might well, and probably would, say that the provider had incurred no expense in providing the particular benefit under consideration. Certainly he incurs no additional cost or expense. I accept, therefore, that, in referring to "the [sic] cost of the benefit" and the "expense incurred in . . . its provision" [clauses (5) and (6)] introduced an element of ambiguity.'

It is submitted that this dictum fails to do justice to the precision of the definition, and that, as the four judges in the courts below unanimously held, there was not really any ambiguity on this point.

What is 'a proper proportion'? This is one of those phrases by which the drafter signals that he is leaving the matter to the court without giving it any further guidance. It could be thought 'proper' to treat the benefit as attracting the same proportion of the expenses as falls to be allocated to the share of the school amenities enjoyed by ordinary pupils ('the average cost'). This would require a simple arithmetical division where the divisor is the total number of pupils (including those enjoying the in-house benefit) and the dividend is the total of the gross expenses. Or it could be thought 'proper' to allow

staffsome advantage by charging them only the additional actual cost to the employer ofproviding the in-house benefit ('the marginal cost').

A third possibility would be to treat it as 'proper' to reduce the average cost by appropriate amounts in certain cases. This could reflect the fact that staff receiving a benefit are not usually in as good a position vis-a-vis the employer as an independent member of the public. Staff may be expected to help out, or accept a lower standard of service. A minister cited by Lord Browne-Wilkinson (at 58) said in relation to airline staff:

> 'It was never intended that the benefit received by the airline employee would be the fare paid by the ordinary passenger. The benefit to him would never be as high as that, because of certain disadvantages that the employee has. Similar considerations, although of a different kind, apply to railway employees.'

Lord Mackay recognised that the taxpayers' sons in *Pepper v Hart* were in a position inferior to that of ordinary pupils (at 46). Where the employer was operating at a loss, so that the price charged to the public was less than the aliquot share of expenses, this approach would allow a suitable reduction. (In *Westcott (Inspector of Taxes) v Bryan* [1969] 2 A11ER 697, [1969] 2 Ch 324, where the relevant wording, contained in the Income Tax Act 1952, s 161(6), was virtually identical, it was held that 'a proper proportion' of expenses had to be ascertained by reference to fairness (see [1969] 2 Ch 324 at 343-344).) It would ensure that the object of the legislation was realised by taxing employees on a fair and reasonable quantification of the benefit received. Strangely, none of the judges in the case (including the Law Lords, except perhaps Lord Mackay) appreciated the elasticity of the word 'proper' or the fact that it gave the court power to arrive at whatever apportionment it held to be fair in the circumstances.

In allowing the initial appeal against assessment the Special Commissioner applied the marginal cost basis ([1990] STC 12, [1990] 1 W L R 204). In reversing the Special Commissioner Vinelott J said, without discussing the point, that in applying this basis 'he must have overlooked the terms of section 63(2)' (clause (6) above) and that the proper proportion was 'a rateable proportion of the cost of the facilities afforded to them all' ([1990] STC 12 at 20, [1990] 1 W L R 204 at 209). The Court of Appeal agreed that a rateable proportion of costs was the 'proper' proportion ([1991] 2 All ER 824, [1991] Ch 203). Slade LJ ([1991] 2 All ER 824 at 833, [1991] Ch 203 at 216-217) [illegible] troubled by the fact that where a facility was provided at a loss (as in the case of a municipal swimming bath) the rateable proportion of costs attributable to staff enjoying the facility without charge might work out at considerably more than a member of the public would pay. The point, mentioned above, that the term 'proper' would enable the court to make an adjustment in such cases was not taken.

It is submitted that, considering only the literal meaning of clauses (5) and (6) apart from reference to Hansard, the provisions were neither ambiguous nor obscure. It is further submitted that the judges below were mistaken, and unnecessarily fettered themselves, in construing 'proper' as equivalent to 'rateable'. This does not mean there was any ambiguity or obscurity in the provisions. Deciding on what is 'proper' was a function left by

Parliament to the judgment of the court (or in the first instance the tax inspector).

House ofLords view What was the view of clauses (5) and (6) expressed by the four Law Lords who, in supporting the creation of the new rule in *Pepper v Hart,* gave more than formal assent? Lord Bridge, accepting that apart from a reference to Hansard, the verdict should go against the taxpayers, contented himself with asking 'whether it could possibly be right to give effect to taxing legislation in such a way as to impose a tax which the Financial Secretary to the Treasury, during the passage of the Bill containing the relevant provision, had, in effect, assured the House of Commons it was not intended to impose' (at 49). Lord Griffiths relied on the *Pepper v Hart* condition as to 'absurdity' (at 50). Lord Oliver said (at 52):

> 'Were it not for [Hansard] I, too would still be of that view [ie that the decision should go against the taxpayers], for, although I recognise that in popular parlance the provision to one individual of a service which is, in any event, being provided for reward to many others may be said to cost the provider little or nothing, "cost" in accountancy terms is merely a computation of outgoing expenditure without reference to receipts.'

However, as noted above, he went on to hold that the words were ambiguous.

Lord Browne-Wilkinson traced the history of clause (6) back to the Finance Act 1948, s 39(1) and (6), where the wording was virtually identical. From the commencement of the 1948 Act until that of the Finance (No 2) Act 1975, s 36(1), which made similar provision, the Inland Revenue for some reason charged tax on the basis not of the average cost or the true 'proper' cost but the marginal cost (at 56). Lord Browne-Wilkinson went on to refer to the passage through Parliament of what became the Finance (No 2) Act 1975, s 36, under which vouchers (other than cash vouchers) issued to staff by employers were rendered taxable. He pointed out that the then Financial Secretary to the Treasury had said in Parliament that in relation to railway vouchers there would be no taxable benefit to staff because 'the railways will run in precisely the same way whether the railwaymen use this facility or not', which also seems to indicate a treatment of expenses on the marginal basis (at 56-57). It cannot be said that the Financial Secretary's statement was 'clear' so as to satisfy the *Pepper v Hart* conditions. Lord Browne-Wilkinson did not refer to the fact that s 36 required apportionment of expenses on the basis of what was 'just and reasonable' rather than what was 'proper' (sub-s (s)(*)).

Lord Browne-Wilkinson then discussed the passage of the Bill containing the provisions that became clauses (5) and (6). He showed how the original Bill had a provision that would have taxed in-house benefits to staff on the basis that they were worth what the public would have been charged for them. This proposal, which would have abandoned the expense basis and brought in the profit element, was dropped in response to protests (at 58). The minister then said that the effect of what became clauses (5) and (6) would be to tax such benefits in the same way as under the existing law. His exact words were (at 58):

> 'The existing law which applies to the taxation of some of these benefits will be retained. The position will subsequendy be unchanged from what it is now before the introduction of this legislation.'

The existing law was administered by the Inland Revenue as though it required the marginal basis. The minister, a Labour MP trained as an engineer rather than a lawyer, showed by his statements in the debate, extensively quoted by Lord Browne-Wilkinson (at 57-59), that he knew only that it was Revenue practice to apply this basis. If this practice had continued, *Pepper v Hart* would never have come to court.

Lord Browne-Wilkinson concluded that the arguments between the marginal and the average basis were 'nicely balanced', that clause (6) was capable of bearing either meaning, and that there was 'an ambiguity or obscurity' (at 70). If he had appreciated the width and flexibility of the term 'proper' he would instead have held that rather than being ambiguous or obscure clause (6) gave the court a desirable room for manoeuvre, under which the marginal basis could have been applied in the instant case without recourse to Hansard.

It is submitted that the true analysis is that Parliament had allowed the court to use its judgment, and the question then would have been whether in doing so it was entitled to rely on statements in Hansard as to the way the government intended the enactment to be administered. It thus seems that, notwithstanding the wording of the *Pepper v Hart* conditions, the rule the decision, lavs, down should apply not only where the sponsor of a Bill has stated what it is intended to mean but also where he or she has stated how a discretionary or judgmental power conferred by it on a government department or similar functionary is intended to be exercised. A passage in Lord Browne-Wilkinson's speech (at 70) comes very near to saying this.

Subsection (6) The House of Lords has ruled in a subsequent case that in the light of information to which reference can now be made under the new rule in *Pepper v Hart* it may be right to overrule an earlier decision made without benefit of that rule. This was laid down in *Stubbings v Webb* [1993] 1 All ER 322. The House overruled the decision of the Court of Appeal in *Letang v Cooper* [1964] 2 All ER 929, [1965] 1 QB 232 in so far as it decided that the phrase 'breach of duty' in relation to personal injuries in the proviso to the Limitation Act 1939, **32**(1) added by the Law Reform (Limitation of Actions) Act 1954, s 2(1) covered, in the words of Lord Diplock, 'any cause of action which gives rise to a claim for damages for personal injuries' (at 245). Lord Griffiths said ([1965] 1 QB 232 at 328-329) that on looking at Hansard 'it becomes clear' that Parliament enacted the 1954 proviso with the deliberate intention of giving effect to the report of a committee which advised that the words should have a narrower meaning, and so they should be given this meaning. Lord Griffiths, who delivered the only full speech, did not identify the relevant passage in Hansard.

The decision in *Stubbings v Webb* is striking because its effect was to deprive the appellant of her remedy for rape and other sexual abuse. It runs contrary to the presumption that, in the words of Lord Reid, 'Where Parliament has continued to use words of which the meaning has been settled

by decisions of the court it is to be presumed that Parliament intends the words to continue to have that meaning' *(London Corporation v Cusack-Smith* [1955] 1 A11ER 302, [1955] AC 337 at 361: see Code p 440). The words had continued to be used unchanged in successive enactments down to and including the Limitation Act 1980, s **11(1).**

Whether in the light of *Stubbings v Webb* a court is now entitled to refuse to follow (as opposed to overrule) a decision on the ground that, though otherwise binding, it was made before the decision in *Pepper v Hart* in ignorance of a relevant Hansard report remains uncertain.

Parliamentary privilege There is a question whether citing Hansard in court infringes parliamentary privilege. Both Houses of Parliament have long insisted on their right to privacy of debate, and consequent secrecy (when desired) of reports of parliamentary proceedings. From this arose the asserted, and finally acknowledged, right of Parliament to control publication of such reports, and to punish infringements as a breach of privilege or contempt of Parliament. In the view of the House of Commons, expressed in a resolution of 1818, this meant that special leave of the House was required for reference to be made to Hansard or other parliamentary reports in court proceedings (Erskine May, *The Law, Privileges, Proceedings and Usage of Parliament* (21st edn, *'9^9)*> P 9')- On 31 October 1980 the Commons passed a resolution giving general leave for such references to be made, thus dispensing with the need for special leave in every case. Its wording is as follows:

> 'That this House, while re-affirming the status of proceedings in Parliament confirmed by article 9 of the Bill of Rights, gives leave for reference to be made in future court proceedings to the Official Report of Debates and to the published Reports and evidence of Committees in any case in which, under the practice of the House, it is required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to Parliamentary papers be discontinued.

(Cited by Lord Browne-Wilkinson in *Pepper v Hart* at 55.)

In the House of Lords there has never been a requirement that the leave of the House be obtained for citation of Hansard reports in court. Indeed, although compiled since 1909 by officers of the House of Lords, Hansard is not formally a record of the House. The Clerk of the Records has nothing in his custody which he could produce to a court as the 'original' report of a debate.

It should be noted that the above resolution gives leave only for *reference* to be made to debates. It does not authorise discussion or argument about what was said in debates. So the Clerk of the House of Commons wrote to the Attorney General, in connection with the proposal to refer to Hansard in *Pepper v Hart,* that the proposed use 'is beyond the meaning of the "reference" contemplated in the Resolution of October 1980'. He went on: 'If a court were minded in particular circumstances to permit the questioning of the proceedings of the House in the way proposed, it would be proper for the leave of the House to be sought first by way of petition so that, if leave were granted, no question would arise of the House regarding its privileges as having been breached'. (The letter is set out in Lord Browne-Wilkinson's speech at 55.)

In relation to proceedings on Bills parliamentary privilege is largely, if not entirely, codified in art 9 of the Bill of Rights. This states that Parliament resolves: 'That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament'. It is declaratory of the law of Parliament, which may in fact go wider (Erskine May *The Law, Privileges, Proceedings and Usage of Parliament* (21st edn, 1989), p 90), and also part of the general statute law binding on the courts. In *Pepper v Hart* Lord Browne-Wilkinson held (at 74) that nothing cited in that case had 'identified or specified the nature of any privilege extending beyond that protected by [art 9 of] the Bill of Rights'.

Article 9 is badly drafted and ambiguous, since 'freedom' may qualify only 'speech' or it may also qualify 'debates and proceedings in parliament'. In other words, is it merely *the freedom* of parliamentary debates and proceedings that ought not to be impeached or questioned or is it the debates and proceedings in their entirety? (As to what are proceedings in Parliament for this purpose *see In re Parliamentary Privilege Acti 770* [1958] AC 3 31, from which it appears that actions taking place outside the precincts of the Palace of Westminster, eg the sending of a letter to a minister by an MP, may be included.) The following possible propositions can be extracted from the words:

1. That the freedom of speech [anywhere] ought not to be impeached or questioned . . .
2. That the freedom of speech in Parliament ought not to be impeached or questioned . . .
3. That the freedom of debates or proceedings in Parliament ought not to be impeached or questioned . . .
4. That debates or proceedings in Parliament ought not to be impeached or questioned . . .

Statement 1 is a proposition about freedom of speech generally. It is plausible, but why should it be permissible to infringe this freedom *within* Parliament? We can see that it is not a correct reading by considering the introductory words leading to art 9 in the selective version given by Viscount Simonds in *In re Parliamentary Privilege Act 1770* [1958] AC 331 at 348:

> '. . . after reciting that "the late Kingjames the Second by the assistance of divers evil Counsellors Judges and Ministers employed by him did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this Kingdom" by the divers means there set out, "the Lords Spiritual and Temporal and Commons pursuant to their respective letters and elections being now assembled in a full and free representative of this nation . . . do in the first place (as their ancestors in like case have usually done) *for the vindicating and asserting their ancient rights and liberties* declare . . ." ' (My emphasis.)

On the word 'declare' here Lord Denning said 'Whatever may have been the privilege of Parliament before the ninth article, it is quite plain that thenceforward the extent of the privilege was to be found by reference to the statute and nothing else' ((1985) PL 80 at 89).

So art 9 is intended to vindicate and assert the ancient rights and liberties of Parliament and no more. It is not concerned with what we should now call the human rights of the population generally.

Statement 2 is undoubtedly one of the intended meanings of art 9. What concerns us is the distinction between statement 3 (the narrow proposition) and statement 4 (the wider proposition, which includes statement 3). Is it only the *freedom* of debates, etc that must not be questioned? Or does the restriction apply generally, so that it is forbidden to speculate as to the meaning of a speech in Parliament or the intention underlying it?

Authority up to the decision of the House of Lords in *Pepper v Hart* shows the wider proposition to be the correct one. Blackstone said 'whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere' *(Commentaries* (17th edn, 1830) I, p 163. Popplewell J said that the origin of this 'seems to have been Coke': *Rost v Edwards* [1990] 2 All ER 641 at 649, [1990] 2 QB 460 at 473). In *Stockdale v Hansard* (1839) 9 Ad & E 11 Lord Denman said 'whatever is done within the walls of either assembly must pass without question in any other place' (at 114) while Patterson J said 'whatever is done in either House should not be liable to examination elsewhere' (at 209). In *Bradlaugh v Gossett* (1884) 12 QBD 271 at 275 Lord Coleridge CJ said 'What is said or done within the walls of Parliament cannot be inquired into in a court of law'. Viscount Simonds in *In re Parliamentary Privilege Act 1770* [1958] AC 331 said 'there was no right at any time to impeach or question in a court or place out of Parliament a speech, debate or proceeding in Parliament'. In *Church of Scientology of California v Johnson-Smith* [1972] 1 All ER 378, [1972] 1 QB 522 at 529 Browne J said 'what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House'. In *R v Secretary of State for Trade, ex p Anderson Strathclyde plc* [1983] 2 All ER 233 at 239 Dunn LJ said that where Hansard was cited:

> '... the court would have to do more than take note of the fact that a certain statement was made in the House on a certain date. It would have to consider the statement or statements with a view to determining what was the true meaning of them, and what were the proper inferences to be drawn from them. This, in my judgment, would be contrary to article 9 of the Bill of Rights.'

In *Rost v Edwards* [1990] 2 All ER 641, [1990] 2 QB 460, which concerned material not within the 1980 resolution set out above, Popplewell J, holding that the wider proposition was the correct one, said ([1990] 2 All ER 641 at 650, [1990] 2 QB 460 at pp 474-475):

> '... if I were faced for the first time with interpreting the word "questioned" in the Bill of Rights I confess that I might well have concluded that it involved some allegation of improper motive. But what is clear is that, given the views of the large number of judges (and, more particularly, their quality) who have interpreted the Bill of Bights, it is simply not open to this court to take that view.'

So, subject to consideration of *Pepper v Hart,* we may remove the ambiguity by restating art 9 in the following form:

> 'That the freedom of speech in parliament, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament'.

Thus to question what is said in Parliament, eg by the sponsor of a Bill, in a court or place out of Parliament is to contravene art 9. This seems to apply to such an act as is rendered permissible by the ruling in *Pepper v Hart*. To allow an advocate to cite in court, as an indication of the intended legal meaning of an Act, a statement made in Parliament by the minister sponsoring the Bill for the Act, surely must involve 'questioning' the ministerial statement in the court. This questioning will inevitably take place when the advocate explains to the court how the statement helps his case, when his opponent puts to the court a contrary view, and when the judge joins in the exchanges and ultimately gives his own verdict on the argument.

The House of Lords decided otherwise in *Pepper v Hart*, though only Lord Browne-Wilkinson gave full reasons for their view. Two others gave very brief reasons. Lord Griffiths said (at 50):

> 'I agree that the use of Hansard as an aid to assist the court to give effect to the true intention of Parliament is not "questioning" within the meaning of s 1 art 9 of the Bill of Rights (1688). I agree that the House is not inhibited by any parliamentary privilege in deciding this appeal.'

Lord Oliver of Aylmerton said (at 53):

> 'I find myself quite unable to see how referring to the reports of parliamentary debates in order to determine the meaning of the words which Parliament has employed could possibly be construed as "questioning" or "impeaching" the freedom of speech or debate or proceedings in Parliament or as otherwise infringing the provisions of art 9 of s 1 of the Bill of Rights.'

Lord Browne-Wilkinson (at 67-69) also rejected the view that art 9 prevented the citation of Hansard for the purpose of construing statutes. He did not discuss the argument as to the narrower and wider interpretation, but assumed the narrower was correct. He did not discuss any of the authorities cited above, except *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 and *R v Secretary of State for Trade, exp Anderson Strathclyde plc* [1983] 2 All ER 233. Of the former he said of Browne J 'his remarks have to be understood in the context of the issues which arose in that case'. The latter he held to be wrongly decided.

The main ground for Lord Browne-Wilkinson's decision was that in judicial review cases 'Hansard has frequently been referred to with a view to ascertaining whether a statutory power has been improperly exercised for an alien purpose or in a wholly unreasonable manner'. He instanced *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, [1991] 1 AC 696. The difficulty here is that no objection appears to have been made to the citation of Hansard in *Brind*. It is not usual to treat a case as authority for a point that was never raised in the case.

The other point Lord Browne-Wilkinson relied on (at 68) was that if the opposing argument were correct 'any comment in the media or elsewhere on what was said in Parliament would constitute "questioning" since all Members of Parliament must speak and act taking into account what political commentators and other [sic] will say'. This overlooks the limiting effect of

the words 'any court or place' in art 9. It is submitted that the ejusdem generis principle applies here to limit the word 'place' to places, such as tribunals, which are of the same genus as 'court'. It was so held in the Australian case of *R v Murphy* (1986) 64 ALR 498. (For the ejusdem generis principle see Code s 379.)